No. 3956

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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CHARLES E. WARREN and MABEL D. WARREN,
Plaintiffs in Error,

vs.

F. GENN BROMLEY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ARTHUR H. BARENDT,
Attorney for Defendant in Error.

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The brief to which counsel for defendant in error is called upon to reply consists of: Attacks upon the character of the plaintiff; endeavors to prove an abandonment which was not pleaded; a claim of many breaches of contract by the vendee in an attempt to dispute the fact found by the lower court that "plaintiff had not failed to perform the contract in any respect but substantially conformed to all its requirements" (Tr. p. 57), and finally a legal argument which attempts to justify the entry by vendors and which overlooks the fact that the first cause of action of the complaint is a count in *indebitatus assumpsit,* and ignores the well established law both as to a vendee's right of recovery

and the measure of damages for wrongful entry by the vendor.

This honorable court is concerned primarily with the facts of the case and the law which contending counsel conceive applicable to the situation disclosed. Counsel will therefore present in this reply brief his views of the evidence under the pleadings and the legal principles and decisions applicable thereto. This will be done on the theory that a certain right of recovery well recognized in courts of justice has arisen in favor of defendant in error, the vendee, as a consequence of the wrongful seizure by plaintiffs in error, the vendors, of the ranch property subject matter of the contract between them.

Throughout this brief Mr. Bromley will be referred to as the plaintiff and the Warrens as the defendants.

Under the heading, "Preliminary Statement" (Op. Brief, page 6), counsel state that in presenting this appeal they will *"rely solely upon the undisputed evidence."* Counsel cannot intend to mislead the court. The evidence on which they rely is at best conflicting, as the record shows. Another strange statement is that occupancy by the Warrens was *"with his* (Bromley's) *consent,"* and yet both Mr. Bromley and Mr. Warren agree that Bromley only asked Warren to look after his stock. (Warren's testimony Tr. p. 194, Bromley's testimony Tr. pp. 132-3-4.) Further on in this brief the claim of

"undisputed evidence" will be clearly shown to be erroneous by a recitation of the evidence covering every part on which it is asserted by counsel for the Warrens to be "undisputed." The testimony will also be quoted in full which flatly contradicts the statement that the Warrens entered with Bromley's consent and it is almost needless to add that no such claim was pleaded in the answer of defendants, or in the belated notice of their attorney.

ABANDONMENT—NONE PLEADED—NONE PROVED.

Late in the day, that is to say, about five months after their answer was filed and eight and a half months after their attorney had sent the post-seizure letter (Tr. p. 105) stating that possession had been taken by the Warrens owing to Bromley's "failure to perform many of the terms and conditions" of his contract, counsel for defendants endeavored to introduce evidence of "abandonment" as justification for the re-entry.

When this was attempted and objected to by Mr. Bromley's counsel the trial judge, Hon. William C. Van Fleet, said:

> The COURT. Where is there anything in these pleadings to raise an issue which would enable you to introduce evidence of this character?
>
> Mr. SCHLESINGER. Paragraph 2, denying that he farmed the land in a farmer-like manner. And Paragraph 3, answering Paragraph 4 of the complaint, we say that the plaintiff did not

> place in the temporary care of a competent foreman. We admit that we did take possession of the property on December 8, 1920, because he had breached his contract, and all his rights had terminated; we further say that we entered, denying that we entered without legal right. That was an orchard which needs constant care; we certainly have a right to protect our property.
>
> The COURT. You will have a hard time undertaking to breach this contract upon any ground that is not alleged here. (Tr. pp. 113-4.)

Nor did counsel at any time point out in the answer where "abandonment" had been pleaded; but merely reiterated the phrase taken from the belated letter of Attorney Wilcox, dated December 9, 1920, the day *after* re-entry by the Warrens (Tr. p. 105) "owing to your failure to perform many of the terms and conditions on your part, etc.," and the corresponding sentences in the answer of defendants, wherein they attempted to justify their re-entry (Tr. pp. 46 et seq.).

The attempt to introduce this unannounced defense was made when Mr. Bromley was being cross-examined:

> (Witness continuing): I know Mr. Wilson very well. He keeps a general merchandise store at Cupertino. Around about October 1, 1920, it was quite possible I had a conversation with him. * * * The first part of the conversation, I think you are correct. I believe I said to Wilson, as well as to several others, that the ranch was not profitable—was not a profitable investment; that I intended to take care of

> it to the best of my ability; and carry out my contract to the letter; but I must combine it with my other business pursuits. (Tr. p 112.)

Following this the witness was asked as to a conversation with Mr. Spencer of the Co-Operative Canneries and the record is as follows:

> It is quite possible that I had a conversation with him at the office of the Co-Operative Canneries in the month of October, 1920, concerning this ranch. I did not in that conversation state in substance that I had quit the place and had to give it up. (Tr. p. 113.)

Later by several witnesses, and by way of impeaching testimony, counsel for defendants endeavored to show that Bromley had announced his intention to abandon the property. Not one of these witnesses could recall conversations to that effect with Mr. Bromley at any time until January 7, 1921,—a month less one day, *after* the Warrens had re-entered,—and even then as a matter of inference at best. The testimony of all these witnesses is to be found on page 200 and pages 203-4-5-6 of the transcript, and amounts to a statement that Mr. Bromley "intended to leave town", which he did; but he returned to the ranch several times after the conversations quoted (Tr. p. 124) except the one (Tr. p. 206) with Mr. King a month *after* the re-entry by the Warrens, that is to say, when Mr. Bromley decided to acquiesce in the abandonment and sue for his damages. It would serve no useful purposes to reproduce any of the testimony; nothing in any con-

versation recalled by any witness contradicts the frequent statement of Mr. Bromley that he intended "to carry out his contract", as already quoted.

When counsel claim the abandonment occurred is a matter of conjecture. In their brief they contend first that the ranch was left unprotected from November 30th to December 8th, and so the Warrens re-entered and yet on page 63 of their brief they cite the conversation with King on January 7, 1921, as evidence of abandonment.

Mr. Warren himself made no claim that Bromley ever said he was going to give up the ranch. Mr. Warren testified that on Novermer 30, 1920 (eight days before the re-entry), Mr. Bromley asked him to "feed the cows and the horses and chickens and to take the milk and eggs." (Tr. p. 171.)

> (Witness continuing:) When I saw Mr. Bromley on November 30th I did not agree to look after his stock. I did not agree to take care of the three horses and one cow during his absence, but I did take care of them. I fed the chickens, and also the two dogs. He had not asked me to do that. He never spoke to me about the dogs. He asked me about the stock. I told him I had all the work I could possibly do.
>
> Mr. BARENDT. Q. You don't remember an answer you gave in answer to that question this morning, and yet you are relating to a conversation with Mr. Bromley that occurred on December 30, 1920?
>
> A. When he asked me to take care of the stock I told him I had all the work I could possibly do, and I did not care to take care of the stock.

Q. Is that the same answer you gave this morning?

A. I think so. (Tr. p. 194.)

Mr. Bromley's version of this conversation was as follows:

Mr. SCHLESINGER. Q. In the month of November, 1920, did you have a conversation with both Mrs. and Mr. Warren, in the city of San Jose, at their home in Cupertino, you being present in which you said in substance and effect that you had no money to pay the balance of unpaid interest due on December 1, 1920, or to care for the property; that you were going to discharge your man because you could not pay his wages, and you owed him a large sum of money, and that you would not do anything on the farm until February; if defendants wanted the ranch cared for, they must do it themselves, —or words to that effect?

A. Yes. This probably transpired at the same time,—that I was owing my man his wages; that I could not pay him, he would be paid later on; he was leaving me to find work. I also told them that all the work necessary to be done was finished up to the end of November, or would be, and that I had started my business in the city as a means of obtaining sufficient income to keep myself, **and also provide funds for the overhead of that orchard,** which was,—I believe I used the expression to Mr. Warren,—that it was a "white elephant". I used that expression to other people as well. I also told Mr. Warren that **I would be running up and down frequently to see that the work on the ranch was properly carried on,** and I think I mentioned at the same time, that I should probably ask Mr. Warren to look after my stock during the time I was looking for a new foreman, and I again repeated that on the 30th day of November, to

which he agreed. Then I think there was some other conversation which took place at that time, which you have not mentioned; Mr. Warren got very heated, and one thing and another—

The COURT (Int'g.). State what it was.

A. I cannot recollect, but I think it was at that conversation that I mentioned that it was rather hard lines that we had parted with our crops and had done our work, but were not obtaining payments for the fruit. Warren said: "We are all in the same box; we have simply to put our shoulders to the wheel and pull through the best we can." I think that was at the same time. * * *

Q. You recollect that you did ask them to look after the stock and not the ranch?

A. Exactly. (Tr. pp. 132-3-4.)

The testimony of plaintiff Bromley and defendant Warren agrees that the request was made by the former that the latter care for his stock and Mr. Warren did *not* claim that Bromley said he was going to abandon the place.

Under cross examination by Mr. Schlesinger, Mr. Bromley testified as follows:

Q. Did you tell him (Warren) in the middle of November, 1920, you and he being present, that you had no money, that you were discharging the man and quitting the place, or words to that effect?

A. Certainly not quitting the place. I had no intention of doing such a thing. (Tr. p. 108.)

Finally, on this topic of abandonment, I quote from Mr. Bromley's testimony showing what he left in the house on the ranch when he went to San Francisco to take up other business pursuits. The

leaving of these things is more potent evidence of intent to return than any statement:

> I had sufficient down there; I could take my wife and little girl down there; bed, sheets, blankets, a chair, wash-stand; that is all, I think, in the bedroom. I left cooking utensils, cook-stove, ice-chest, plates and cups and saucers, knives and forks, and sufficient crockery to eat with. I left lots of personal clothing of my own and my wife's, my military uniform. I have not a list of how many shirts and pajamas, and undervests, but there is quite a quantity of it. My military uniform, and my military kit is there, my working clothes for the labor, my boots, plenty of them, cover-alls. Some of my wife's clothes were left there, dresses, millinery, underwear and her riding clothes. (Tr. p. 122.)

In the face of this uncontradicted testimony and their clients' admissions (Tr. pp. 181-2) of the many personal and household effects in addition to the stock that he found on the ranch, counsel for the Warrens say, on page 8 of their opening brief:

> * * * **He abandoned the property and moved with his family to San Francisco taking with him all of his household furniture.**

Nor is this the only glaring misstatement of fact made by counsel. Mr. Warren has just been quoted as having a conversation with Bromley "at their home in Cupertino", that is on the property adjoining the Bromley ranch, on November 30, 1920, eight days before the Warrens wrongfully entered, and yet counsel say:

> **We have heretofore pointed out to this court the testimony of plaintiff to the effect that when he left**

the ranch on October 8, 1920, he had no intention of returning to it until the 1st of February.

This must be some of the "undisputed evidence" on which counsel claim to rely. Yet they are contradicted out of the mouth of their own client, Mr. Warren, and over and over again by Mr. Bromley. Mr. Bromley's foreman, Savio, worked on the ranch until November 30, 1920 (Tr. p. 107) and only for eight days when "there was nothing more to do", when the ranch "had been cleaned up" (Tr. p. 125), was no one working there, though the hired man was still on the place until after the Warrens seized it. (Tr. p. 104.)

NO DEMAND BY DEFENDANTS PRIOR TO RE-ENTRY.

The answer of defendants fails to allege any demand prior to entry. It merely denies wrongful entry and asserts that re-entry was justified "for the reason that plaintiff had breached said contract as in this answer alleged." (Tr. p. 46.)

The re-entry was made on December 8, 1920, in the absence of Bromley, who testified:

> The first intimation I had of Mr. Warren's living in the house came from my foreman in the shape of a letter, asking me if I knew that Mr. Warren was living in the house. It was early in December; my old foreman was still living on the place; his furniture was still there; he had a cottage; he had accommodations there; he wrote me inquiring was I aware that the Warrens were living in my house.
>
> Q. Subsequent to that did you receive any written communication?

A. None whatever. I had no communication with the Warrens after arranging with the Warrens that they should feed my stock.

Q. Did you have any communication with Mr. Warren's attorney subsequent to that?

A. No; that came in after the letter from my foreman. (Tr. pp. 103-4.)

In the letter dated December 9, 1920, the Warrens' attorney (Mr. Wilcox) notified Bromley that his clients,

> * * * have requested me to notify you that owing to your failure to perform many of the terms and conditions on your part to be performed * * * they have elected to terminate the agreement and have taken possession of the property, etc. (Tr. p. 105.)

Charles Warren admitted he re-entered without demand:

> When I went into the house there was a rug folded up, laying in the middle of the floor, and a baby buggy. I occupied the house and am occupying it now. I simply moved over.
>
> Q. You went into this house and took possession and never said a word to Mr. Bromley about it?
>
> A. No sir. (Tr. pp. 193-4.)

* * * * * * *

> I have not heard from Mr. Bromley, either in writing or talked with him personally since the 8th of December, 1920. (Tr. p. 179.)

During the whole year December 1919 to December 1920 the Warrens occupied the adjoining property. (Cross-examination of Mr. Bromley by Mr. Schlesinger):

> Q. Don't you know that the Warrens were not living there, that they lived on the adjoining property?
> A. They had the adjoining property. (Tr. p. 108.)
>
> (Testimony of Mr. Warren.) In 1920 I lived next door to this property, on the adjoining piece of property. I had occasion to inspect that ranch in the year 1920. (Tr. p. 175.)

Never a word of complaint did the Warrens make in reference to the alleged failure of Mr. Bromley to farm the place "in a first class farmer-like and orchardist-like manner." Mr. Warren said he "went on Browley's ranch perhaps once a week" (Tr. p. 188), but he failed at any time to mention even one of the omissions to perform upon which he based his right to re-enter and take possession of the property. Mr. Bromley in answer to his counsel's categorical questions, said:

> At no time between December 1st, 1919, and December 8th, 1920, did Mr. or Mrs. Warren ever tell me I was not cultivating properly or that I was not irrigating properly or that I was not pruning properly. (Tr. p. 98.)

Mr. Warren knew Mr. Bromley was new to orcharding:

> Q. You knew he was a man of no experience?
> A. I was directing him. (Tr. p. 195.)

The answer of defendants does not allege any demand either for interest or for anything else and no testimony was offered in support of any demand whatever, either prior to or subsequent to re-entry by the Warrens. *After* the re-entry the Warrens,

through their attorney, merely announced that they had terminated the contract; had taken possession of the property and personalty thereon owing to Mr. Bromley's "failure to perform many of the terms and conditions of the agreement."

> The COURT. Very cleary, *under this contract,* in order to put plaintiff in default for interest or principal, such as to justify the defendants in undertaking to set aside the contract, it must appear that he was put in default by a demand showing specifically what their claim was, as to his failure to perform the contract. (Tr. p. 163.)

BROMLEY'S ALLEGED FAILURE TO PERFORM HIS CONTRACT.

There remains but one question of fact to be considered—the only one as to which issue was joined in the first count. Plaintiff alleged performance and defendants denied specifically, stating the particulars in which they alleged he had failed to perform.

The failures alleged were: (a) failure to pay interest; (b) failure to pay taxes; (c) failure either to irrigate properly, to prune properly, to eradicate rodents or to spray trees, etc.

The first two of these allegations are questions of law involving interpretation of the contract; the third is a question of fact.

One of the cardinal rules of interpretation of contracts is that a contract must be considered as a

whole—all its provisions must, if possible, be reconciled so that the true intent of the parties may be ascertained. It must be taken by the four corners. If that be done in the case at bar the conclusion cannot but be reached that the proponents recognized the uncertainties attendant upon the raising of fruit crops, their prices and quantities. They realized that annual payments of interest might not be made at the end of each twelve months and so provided that "if not paid as it becomes due it shall be added to the principal and become a part thereof and thereafter bear interest at the same rate" (Paragraph No. 3, Tr. p. 13), and so too with "any of the assessments, insurance premiums, liens or encumbrances on or affecting said property when due." (Paragraph No. 5, Tr. pp. 16 and 17.) Now bearing in mind the fact that the gross yield of this ranch was $19,700 (Tr. pp. 152 and 195) in 1919; but $6000 gross in 1917, and that for 1921 the Warrens expected "a gross yield" in the neighborhood of $7500 (Tr. p. 193), it is evident what a vast difference in price and productiveness existed. When Bromley had the ranch prices were very low (Tr. p. 155), other ranches suffered "a wonderful loss" and the net was about $4000 with the final returns not all in as late as January, 1922. (Tr. p. 117.) The Warrens received $6000 cash when the contract was signed December 1, 1919 (Tr. p. 2) and about $2064 (Tr. p. 44) for grapes and advance payments from the two fruit companies and they re-entered December 8, 1920.

In interpreting the contract I cannot do better than quote the words of the learned judge of the District Court. He had occasion to consider the contract on the demurrer (Tr. p. 37) to the complaint and to pass upon and quote from it repeatedly during the trial. After denying the defendants' motion for a non-suit and while the defense was putting in its evidence, the court said:

> The contract reads: "The balance of said purchase price, to wit, the sum of $45,000, shall be paid in lawful money of the United States of America on or before five years from this date, together with interest thereon from date until paid at the rate of six per cent per annum, payable annually, and if not paid as it becomes due, it shall be added to the principal, become a part thereof and thereafter bear interest at the same rate." That is the provision which controls the rights of the parties under the contract as to interest. If the annual interest is not all compensated in the way the contract provided, plaintiff would have had a right to pay it out of his own pocket; if it is not paid, the contract provides it shall become a part of the principal and bear interest. *It is one of those contracts that is made in view of the exigencies and uncertainties that arise out of agricultural pursuits.* The contract provides that the entire balance of $45,000 shall be paid within five years, but then it provides, and that was for the sellers' security, that annually 60 per cent of the crop shall be allocated to him, and he out of that should first apply it to interest, and then on the principal, but the purchaser is given a leeway of five years in which to be able to make the price of the property. (Tr. pp. 185-6.)

That this is the correct interpretation of the contract both as to the manner of payment of principal

and interest there can be no question. The allocation of the sixty per cent was made according to the contract. For the grapes, which were sold for cash, Mr. Bromley accounted immediately to Mr. Warren.

> * * * When I sold my grapes I shared them with Mr. Warren according to the stipulated amounts. He took sixty per cent. * * *
>
> Whatever moneys I got prior to December 8, 1920, the proceeds were paid direct to Mr. Warren. In the matter of the grapes I got cash and paid him and he receipted for it. (Tr. p. 101.)

The answer admits the receipt of $288.69, in two items for grapes (Tr. p. 44), and payments on the crops as allocated and delivered to the two fruit companies named in both complaint and answer. (Tr. id.)

The complaint alleges that the crops, except grapes, were delivered to the California Prune & Apricot Growers, Inc., and the California Co-Operative Canneries with the knowledge and consent of defendants, and "at the express request and order of plaintiff, defendants were credited with 60% of the crop. (Tr. p. 5.) No attempt was made to contradict Mr. Bromley's testimony (Tr. p. 101) in support of this allegation and Mr. Ralph Spencer, a witness for the defense, stated that Mr. Bromley had instructed him to allocate a part of the returns of the fruit to Mr. Warren. (Tr. pp. 200 and 202.) Mr. Warren admitted having received money from both companies (Tr. p. 186); made no attempt to deny that Bromley had done as he swore in his complaint and testified on the witness stand.

The accounts of neither company for the 1920 crop were closed on December 8, 1920, and the payments made to Bromley and Warren up to that time were "advances" (Tr. p. 200) on prospective crop returns. The final account of the Co-Operative Canneries "was issued on August 3 (1921)" (Tr. p. 201) and received by Bromley in October, 1921 (Tr. p. 117) and when Mr. Bromley in January, 1922, was on the witness stand he testified that the Prune Growers' Association had not even then made their final returns for the crop of 1920. (Tr. p. 117.) It is therefore evident that on December 8, 1920, the value of the 60% of the crop was not known, for the crops had not been sold and the *proceeds* could not "be disposed of in the manner provided for in the contract." (Tr. p. 14.) But, whether the returns would or would not have been sufficient to pay a year's interest and something more on account of the principal, the allocation had been made, the title to the 60% had passed to the Warrens. In other words, the *manner of payment* had been complied with, the *amount of payment* could not be apportioned either to principal or interest until *all* the proceeds of the year's crops had been accounted for.

The answer admits that the money as received by the Warrens was credited to interest (Tr. p. 44) and there was more money to come from the same sources, i. e. the two companies. (Tr. p. 141.).

In like manner the taxes if not paid by the vendee could be and actually were paid by the vendors. (Op. Brief, p. 25.) The contract in paragraph 15

(Tr. p. 16) provides that in the event of the second party failing "to pay any of the assessments, insurance premiums, liens or encumbrances affecting said property when due, the parties of the first part retain the privilege of paying the same and upon doing so, said amount or amounts so paid shall thereupon become a part of the principal and shall bear a like interest and be immediately due and payable." And paragraph 13 contemplates and recites that "upon the payment of said principal sum together with all interest, taxes and obligations herein mentioned, etc.", the parties of the first part will execute and deliver to the party of the second part a grant, bargain and sale deed. Commenting upon these paragraphs, the court said:

> The COURT. He is showing how he came to go back there. They have a right to show what the grounds were that they re-entered, within the terms of that notice. They cannot be permitted to show he re-entered because he had not paid interest, or had not paid the purchase price, or re-entered because he had not paid taxes. I am talking about the notice. He cannot at this time put the cause of his going upon this land on any other ground except that stated. (Tr. p. 176.)

The notice referred to by the court was the letter of attorney Wilcox dated December 9, 1920. (Tr. p. 105.)

Nor did Bromley fail either to remove dead trees, to irrigate, to cultivate or to eradicate gophers on his pest-ridden costly property. The court found as a fact that Mr. Bromley "had not failed to per-

form the contract in any respect but substantially conformed to all its requirements." (Tr. p. 57.)

Before presenting any excerpts from the record along these lines it is opportune to remark that the testimony was relevant only to the question of damages; that is to say, in mitigation of the damages claimed. There having been no claim of failure to perform *prior* to re-entry by the Warrens, when the defense endeavored to show this failure counsel for Bromley objected and the court then ruled that the testimony was admissible for the purpose of reducing damages, not to justify re-entry. In the light of this statement I will epitomize the testimony responsive to the issues, specifically joined by the answer, in reply to the complainant's allegations of performance.

Removal of dead trees and replanting.

Mr. Bromley could not remember how many dead trees he removed, but referred to his diary, where he himself had made entries on different dates, showing that he had removed them. (Tr. p. 130.) He did not replant them because in the last week in February, or the first week in March, 1920, he had a consultation on his ranch with Mr. Warren. Mr. Warren admitted having that discussion and he decided that the trees should be left for the year. (Tr. pp. 194-5.)

> The occasion of that visit Mr. Warren came right through the orchard discussing general orchard matter. * * * I wanted to work that

> land up so when irrigation came my water would saturate the soil * * * my idea was to dig out the old trees and cultivate and encourage the new trees. * * * Mr. Warren said it would be better to take advantage of that year's crop on the old trees and let them stand at least one more year. (Tr. p. 221.)

The witness testified also that Mr. Warren examined the trees. (Tr. p. 223.) In spite of this decision by Mr. Warren, Mr. Bromley tried at the principal nurseries in San Jose to buy new trees and could not get them. (Tr. p. 223.) The testimony shows that young trees for planting should be ordered early in the preceding year for delivery in the following spring, and so, however good Mr. Bromley's intentions were in reference to replanting, he was excused because Mr. Warren decided against it and because new trees were not obtainable, and Mr. Warren had failed to order them in 1919.

Pruning. Mr. Warren admitted that the pruning for the year 1920 was properly done. It had been done by Okumura, the man he had recommended to Bromley. (Tr. pp. 97-8 and p. 101.) His complaint was and could be only that Bromley did not prune between the 1st of November and the 8th of December, 1920.

> Witness (continuing). I did not say that Mr. Bromley was not pruning the place properly. It was properly pruned in the season of 1920, but not in the latter part of 1920.
>
> Q. What do you mean, "the latter part of 1920"?
>
> A. You must remember that our seasons are from one year to another; in November and December.

Q. November and December? A. 1920.
Q. That is the only time that you claim the place was not properly pruned by Mr. Bromley?
A. Yes.
Q. That is all, absolutely?
A. Yes. (Tr. p. 190.)

During these two months of the year some orchardists prune; others do not.

Mr. Bromley was told by Mr. Postlethwaite that the trees were very poorly pruned (Tr. p. 151) and there is among orchardists a very considerable difference of opinion in regard to the time of pruning trees.

Q. Is there not a difference of opinion among orchardists in regard to the time of pruning trees?
A. Certainly, a very considerable difference. (Tr. p. 214.)

This latter quotation is an excerpt from the cross-examination of Herbert Pash, one of the witnesses for the defense. Mr. Postlethwaite also referred to the difference in opinion in the matter of pruning trees (Tr. p. 157) and stated that he left his ranch for *three* months during the winter doing nothing at all except trapping gophers once a week or so. (Tr. p. 152.)

Irrigation. Bromley testified that he "pumped all day as soon as water was available" (Tr. p. 100); that he prepared his irrigation ditches in advance with a new ditcher "double the size" Warren used (Tr. p. 227); that his pump delivered a thousand gallons a minute (Tr. p. 106); that the whole of the upper part of the orchard was irrigated thoroughly;

the water broke over the banks and partly flooded the lower flat, and by the time he had worked up to that bank there was no water to be drawn out of the creek; "that means I irrigated thoroughly as long as water was available." (Tr. p. 131.)

The testimony of Mr. Bromley as to when he commenced to irrigate and when the water was available, taken from entries in his diaries, is entitled to more credence than the uncertain recollection of the three witnesses for the defense, particularly in view of the fact that these three witnesses do not agree as to when there was water available in the creek. (Tr. pp. 225-6-7-8.)

On page 228 of the transcript Mr. Bromley states that there was not sufficient water available between the 23rd of January and the 16th of March. The pump which he had taken over from Mr. Warren was apparently dilapidated just as were the tractor and the disc which he had bought from that gentleman; the pump was continually breaking down (Tr. pp. 228-9) and yet, Mr. Bromley never lost an opportunity to irrigate, even as late as June 28th (Tr. p. 230), when there was any water to be had, except when Mr. Warren, who was lower down on the creek, asked him to stop so that he, Warren, might get some water.

Mr. Warren testified:

> The creek came down in December, then it stopped for about two weeks. Then it came down in January, from then until the end of March it ran on and off. I figure the creek ran

that year, I watched it very closely, for about eight weeks. (Tr. p. 216.)

Mr. Pash differs with Mr. Warren, for he says:

Mr. SCHLESINGER. Q. What time in the spring did it come down again?

A. The latter part of February or the early part of March. That is a thing that was impressed on my mind, for the creek to come down early and dry up, and then come back. (Tr. pp. 211-2.)

Okumura, the Japanese, does not agree with either Mr. Warren or Mr. Pash, for he says unqualifiedly:

From the first of January, February and March there was plenty of water in the creek. (Tr. p. 218.)

The U. S. Department of Agriculture's figures for 1920 (Tr. p. 197) in the Santa Clara Valley show only one tenth of an inch for January, one and four hundredths inches in February, and three and forty-three hundredths inches in March. Mr. Warren flouts these figures (Tr. p. 198); on the other hand, Mr. Bromley's diary entry that the water was available in the creek on March 16th for the first time (Tr. p. 227), seems to be fully corroborated.

PLOWING, DISKING AND SPRAYING. The defendants alleged in their answer that plaintiff did not plow said orchard at all; did not double-disk more than half the orchard and did not spray the pear trees as often as customary or more than half the

apricot trees. (Tr. p. 47.) Not one of these claims did defendants substantiate. Bromley double-disked, deep-furrowed and cultivated the ranch (Tr. p. 98) and the banks were horse-plowed. (Tr. p. 119.) Postlethwaite said Bromley did more disking that was necessary. (Tr. pp. 151 and 152.) The same witness stated that he did not plow at all but disked and cultivated for three years on a very successful orchard. (Tr. p. 147.) It would be waste of time to argue the question of plowing vs. disking. As to spraying, Mr. Bromley gave the dates on which he sprayed (Tr. p. 132) and there is *no* testimony to show whether he sprayed too much or too little.

Gophers and Rodents. Warren testified that he left one dozen traps on the orchard (Tr. p. 192) and Bromley found that dozen and set "at least" six dozen more. (Tr. p. 223.) Then he had boys hired for two or three weeks shooting squirrels and laying poison, etc., on this gopher-riddled ranch. (Tr. p. 139, pp. 148-9 and p. 224.)

Two Months of Neglect (?) Counsel make the claim that "this valuable property had been deserted since November 30th" (Op. Brief, p. 19), and so to rescue the ranch with its three dozen gopher traps, its dead, dying and gopher-girdled trees (Tr. p. 148), its walnut trees set in ground as hard as cement (Tr. p. 106 and p. 155) and unprotected from insects (Tr. p. 143), all its crops garnered and the entire place cleaned up (Tr. p. 125), they had to rush in unannounced! In counsel's brief,

page 19, this note of alarm is struck and (unintentionally I admit) the error is made of giving December 8, 1920, as the day when the Warrens notified Bromley that "they had elected to terminate the contract." The fact is the letter of their attorney was dated December 9th, and was mailed the day *after* the Warrens had re-entered. Bromley's foreman, Savio, wrote him that Mr. Warren was living in the house (Tr. p. 104), and later he received attorney Wilcox' letter. (Tr. p. 105.)

The fact is that there was nothing to do on the ranch in the two months. Bromley had cleaned up the place:

> * * * I made no arrangements for the care of the ranch; there was nothing whatever to do; no work was necessary to be done on the ranch.
>
> Q. Mr. Bromley do you testify that it was your intention that nobody should farm that place, and look after it between October and February, at which time you intended returning?
>
> A. There was work done after October. There was no work necessary to be done from the 1st of December until the end of January.
>
> Q. What work was done during the month of October, to your knowledge?
>
> A. The ranch was cleaned up and all the scrub burned.
>
> Q. What work was done during the month of November? A. The same.
>
> Q. What work did you expect to do there and have done during December and February?
>
> A. There was nothing to do. (Tr. p. 125.)

Mr. Postlethwaite was cross-examined upon this subject and testified as follows:

Q. Did you ever, in your experience as an orchardist, ever hear of any man leaving a place without himself or foreman, or other man in charge for two months at any period of the year?

A. Yes. I did it myself for three months.

Q. You have done that yourself? A. Yes.

Q. Around San Jose? A. Yes.

Q. Where is this place?

A. On the highway, near Lawrence Station.

Q. Where you had prunes and apricots growing?

A. Yes; during the months of from the middle of October to about January 1st nobody was on that place at all. I went down once a week myself to look for gophers.

Q. Do you say that with a ranch of this kind, with the existing weather conditions, the character of the soil and age of the trees, and the climatic conditions, that it would be prudent and farmer-like for a man to leave the property without anyone in charge for the months of December and January, and not return until February?

A. I consider it was a business-like thing to do.

WITNESS (continuing). There is nothing to be done on the ranch in November and December that cannot be done later, except for the gophers and squirrels; where you cannot get water when you want it. A man can prune during the months of December and January, and he can prune during February and March just as well. (Tr. pp. 152-3.)

The Law of the Case.

I venture respectfully to suggest that counsel have misconceived the theory of this entire case and the law applicable to it.

The first count of the Bromley complaint is *indebitatus assumpsit* and is predicated upon the theory that where a vendor wrongfully breaks his contract the vendee has the option of pursuing any one of three courses. One of these options is to acquiesce in the breach and sue in *assumpsit* for the recovery of moneys expended under the contract. It is this course that Bromley pursued.

In *Glock v. Howard Colony Co.,* 123 Cal, 1, there is a graphic recital of the relative rights of vendor and vendee. On page 10 of that decision, discussing the rights of the vendee, the decision says:

> * * * or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when the contract having thus come to an end he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise.

The latter course referred to in this excerpt was followed by plaintiff here. He sued in *assumpsit* to recover what he had expended while the contract was in existence. To this he has added a cause of action for conversion of the personal property belonging to him, seized by the vendors at the time of the alleged wrongful breach of the contract and retained by them.

In *Thomas v. Pac. Beach Co.,* 115 Cal., 137, in passing upon the character of the action for the purpose of determining the particular section of the Statute of Limitations applicable to it, the court

after explaining that the action was brought to recover, with interest, the purchase money paid by plaintiff, says on page 141:

> Actions of the character of the case at bar have been uniformly treated as actions resting in implied *assumpsit* as for money had and received. (Joyce v. Shafer, 97 Cal., 335; Shively v. Semi-Tropic Land Co., 99 Cal. 259.)

The case of *Thomas v. Pac. Beach Co.* (supra) has been repeatedly quoted, one of the most recent citations being in *Lemle v. Barry,* 181 Cal. 2-3, where the court, after referring to the case, says:

> It was there held that such an action was not an action upon the contract. * * * On the contrary, the action for a breach of contract is one based upon the contract.

One of my learned opponents, Mr. Schlesinger, was counsel for the successful appellant in the case of *Breen v. Roy,* 8 Cal. App. 475, and at page 478 the court says:

> The performance of the contract having been prevented by the defendant the action was brought in the form of *indebitatus assumpsit,* and not directly upon the contract. This might be done, as the contract was the basis upon which the cause of action arose, and was admissible in evidence. (Citing Reynolds v. Jourdan, 6 Cal. 108.)

A case almost on all fours with that at bar is *Heilig v. Parlin,* 134 Cal., p. 99, where the plaintiff was required on taking possession of the land under an agreement of sale, to make certain payments and, at his own expense, to set out vines or fruit trees.

He entered into possession, paid $885 on the purchase price and expended $1455 in improvements. The vendor served a notice in writing after the vendee's default demanding possession of the land, and notified the vendee that the contract was absolutely abandoned and determined because of the failure to make said payment, and the vendor took possession. The court says, page 101:

> The matter directly involved in this action is the right to recover money paid on a contract rescinded by the other party to it. The only thing appearing upon the face of the judgment to have been adjudged in the former action is the title of Parlin, the plaintiff therein, to the land in question and his right to have such title quieted, and that judgment was entered upon the default of the defendant, the plaintiff here, which was an equivalent to a disclaimer on his part to any claim or title to said land. In other words, he acquiesced in the rescission of the contract on the part of Parlin, and falls back upon his right resulting from such recission *to recover the money paid, laid out, and expended while the contract subsisted.*

The cases cited by counsel can be very briefly disposed of. They all proceed on the same theory that a default or defaults on the part of Bromley existed. The facts show that Bromley was *not* in default in any matter whatever but on the contrary performed his contract as the court found he did. For in the oral opinion, reduced to writing and filed September 20, 1922, the court says:

> I am not going to review the evidence but after its careful consideration it is sufficient for

> me to say that in my view plaintiff had not failed to perform the contract in any respect but substantially conformed to all its requirements; and that he was entirely within his rights in treating the conduct of the defendant as a breach of the contract by the latter and suing to recover the moneys that had been paid by him upon the contract with the value of the personal property taken by the defendant and also the expenditures by him made in undertaking to carry out the contract. (Tr. pp. 56-7.)

There having been no default, the starting point of right of entry in the Warrens was missing and the cases cited by their counsel to show what happens *"on a default by the vendee"* can have no bearing on the case at bar. The case of *Catterlin v. Peterson,* 40 Cal. App. Dec. 261, turns on the sentence *"on a default by the vendee without legal excuse, etc."*

In the case of *Los Angeles Investment Co. v. Wilson,* 39 Cal. App. Dec. 600, quoted on page 49 of counsel's brief, they italicise on page 50 the very words upon which that case hinges and enunciate a statement of fact that does not exist in the case before this honorable court. The italicised words referred to are:

> The vendee *being in default,* the vendor might have held possession, lawfully, without any affirmative action.

In the case of *List v. Moore,* 20 Cal. App. 620, there was no question but that plaintiff, the vendee, was in default,

> that he was at all times unable or unwilling to carry out or perform the same on his part, al-

> though the defendants were at all times ready and willing to perform the same on their part. (Foot of page 618.)

Recovery was denied *because* of the default. In the case at bar there was *no* default. This the learned judge of the U. S. District Court found "after giving it (the evidence) careful consideration." (Tr. p. 56.)

Where a vendor simply enters without notice or demand and so puts an end to the contract, the vendee is entitled to acquiesce in that action and recover what he has paid. This law runs through all the decisions. It is only when the vendee resists reentry and refuses to perform that the vendor is not obliged to refund—both then are standing on the contract.

Counsel quote from the case of *Hansborough v. Peck*, 72 U. S. 497, 18 L. Ed. 522, and fail to see the difference in the situation there disclosed from the case at bar. In the case cited the vendor sued to recover possession, as the case says:

> * * * the law will not permit him (the vendee) both to withhold the purchase money and keep possession and enjoy the rents and profits of the estate; nor will it subject the vendor to the return of the purchase money if he is obliged to go into a court of equity *to be restored to the possession.*

The court in that case then states that:

> * * * no rule in respect to the contract is better settled than this, that the party who has advanced money or done an act in part per-

> formance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done. Green v. Green, 9 Cow. 46; Ketchum v. Evertson, 13 Johns. 364; Leonard v. Morgan, 6 Gray 412; Haynes v. Hart, 42 Barb. 58.

In the case at bar Mr. Bromley never stopped short and never refused to proceed. No demand of any kind was ever made of him. No abandonment was pleaded or proved. He did not stop short; he paid in cash 60% of the moneys he received for his grapes and made the allocation of 60% of all the other crops in strict compliance with his contract. Then,—in his absence,—unannounced—the Warrens re-entered. Is it necessary to go further in pointing out the essential differences between this case of *Hansborough v. Peck* and the case at bar?

In their notice mailed subsequent to their re-entry the attorney used words which put an end to and canceled the contract. These words were:

> **They have elected to terminate the agreement.**

The Warrens terminated the contract and Bromley made it mutual by acquiescing in the termination. Then he sued to recover the moneys paid, expended and laid out while the contract subsisted.

Counsel quote from the case of *Schwerin Estate Realty Co. v. Slye,* 173 Cal. 170; but overlook the fact that the plaintiff was *standing squarely on the contract,* not suing in *assumpsit* based on a contract

already at an end. This is clear from the language of the decision and from the fact that whatever rights the defendants claimed, they asserted under the contract:

> But respondent as late as March 28, 1913, tendered a deed and offered to put defendants in actual possession of the property upon payment of the balance of the purchase price. If the vendees had desired to consummate the contract or to recover back their deposit they should have made a tender of the balance due and should have demanded performance by the vendor. Not having done this they are not in a position to demand the relief for which they have prayed. (Citing many California cases.) *Schwerin Estate Realty Co. v. Slye,* 173 Cal., 170 at 182.

It has been held over and over again that the clause in a contract permitting a vendor to retain moneys paid by the vendee after the latter's default is a mere declaration of right which exists without the necessity of its being expressed in the contract. This right, however, comes into being only *on default of the vendee.* It may be waived by the vendor. It cannot be successfully asserted by the vendor in the absence of default on the part of the vendee. Whenever the vendor has terminated the contract wrongfully, the vendee, as a matter of absolute right as clearly defined as that of the vendor just mentioned, is entitled, as said in *Glock v. Howard Colony Co.,* and a score of cases sustaining it, to recover what he has paid, expended and laid out while the contract was still in existence—the contract which the vendor has wrongfully breached.

I will not waste time replying to the suggestion "Plaintiff has sustained no damage by reason of defendant's re-entry." (Caption, defendant's brief, page 59.) The measure of damages in cases such as this is tersely stated in *Heilig v. Parlin* (supra) as "the money paid, laid out and expended while the contract existed". The court found in this case that Mr. Bromley had paid $6000, that the "money expended over and above what he received in the way of returns from crops, etc.," was $1200, and that the personal property taken over by defendants when they re-entered was worth $1800.

Counsel make no argument on the count in conversion. Bromley stated in detail the items of personal property left by him on the ranch and gave their value. (Tr. pp. 119-123.) Mr. Warren admitted that the stock was still on the ranch; that he bought for $1000 (Tr. p. 192); the tractor billed to Bromley at $1575, and on which $500 (Tr. p. 120) had been paid and that he used some of the lug boxes, fruit trays, and that sundry other articles were "still there." (Tr. pp. 192-3.)

THE ATTACKS ON MR. BROMLEY'S CHARACTER.

Irrelevant though it may be, if the attacks on Mr. Bromley are passed unnoticed it might be assumed that their truth was admitted. This as a lawyer and in justice to his client, counsel for Mr. Bromley cannot do. The indulgence of this honorable court

is therefore asked, while without harshness or unnecessary burden of verbiage, a reply to these uncalled for attacks is presented.

Counsel's short statement at the top of page 7 of their brief is headed "Statement of Facts". In the four line paragraph it is alleged that at the time plaintiff sought to purchase the property subject matter of the controversy "he represented himself to be a man of great wealth; and able to assume all of the financial obligations of the contract". Even if such were the fact it would nevertheless be irrelevant to any issue in the case, for the defendants (the vendors) nowhere justified their wrongful seizure of the ranch by pleading false or fraudulent or any misrepresentations on the part of Mr. Bromley, the purchaser. Furthermore there is not a line of testimony to show that either of the defendants ever heard of the alleged misrepresentations.

That he did not misrepresent his possessions must be evident from a perusal of the pages of the transcript cited by counsel. (Tr. pp. 231 to 236.) Mr. Bromley testified that in 1914 he made a deposit of several thousand pounds in the Russia & English Bank in Petrograd and that he had a bankbook showing the deposit. Does anyone knowing anything of current world history in Russia between 1914 and 1921, need to be told that probably many thousands besides Bromley have never since heard of their bank accounts in Petrograd or their deposits made there "in the first year of the war"? (Tr. p.

236.) However, it is evident that Mr. Bromley is entitled to no hearing in court because he will in all human possibility never see a ruble of his Russion deposits!

Again, nowhere in his testimony did Mr. Bromley say or claim "to be the owner of one of the largest vessels in the world". (Op. Brief, p. 7.) What he did say was clear and to the point, but like his testimony as to the Russian bank deposit, it prompted no further inquiry on the part of the defense. Mr. Bromley said *inter alia*:

> I am the owner of one vessel and part owner of four others. They are in the Pacific, trading down the China Coast and in the Straits Settlements. The boat I own is the "Kango". She plies between Hongkong and Torres Island and was there the last time I heard from her the early part of last year. I cannot tell who her captain is, she is under the control of Hang Mow & Co., my agents in Hongkong. The "Asia" I saw in Hongkong; her tonnage is about 22,000. She is registered in Lloyds under the Chinese flag. She was a British cruiser. I cannot tell you the name of the master. I heard from her last in the spring of last year. She came up from the islands loaded with copra. These vessels are registered, all four of them in the name of the company in the headquarters at Hongkong, in the British Government.
>
> The COURT. How does it come that you received no returns from these investments?
>
> A. They are not making money at the present time, like many other commercial organizations in the Orient.
>
> Q. When did you last receive returns?
>
> A. When I was in Hongkong just before coming to California.

Q. Did you come from Hongkong here?
A. Yes.

(Paraphrase of Testimony, Tr. pp. 232-5.)

Because counsel are unfamiliar with trade conditions in the Orient during the past few years, they ask this honorable court to assume that this testimony is pure fabrication. The field of inquiry was voluntarily thrown open to them; but they declined to follow up their examination of the plaintiff along those lines and closed thus:

Q. You were engaged in the opium trade, were you not?
A. I have been. (Tr. p. 236.)

And yet during the war every nation on each side clamored for opium. Opium is not used only by the heathen Chinee, but by the Caucasian, in paregoric (tincture of opium), in laudanum (lead and opium), in Dovers powders (ipecac and opium), and in morphine and codia, to give the diseased and the wounded surcease from their sufferings!

These charges of misrepresentation and engaging in the opium trade are relevant to no issue, but are made apparently only to injure the name of "Major" Bromley, for that was his rank in the British Army, (thrice) wounded (at Vimy Ridge) then honorably discharged, and who came to California by way of Hongkong (Tr. p. 234) to recuperate his shattered health. (Tr. p. 97.)

No useful purpose would be served by replying in kind to the assault thus made upon the defendant in error; but some of the facts in regard to the prop-

erty sold by the Warrens to this novice in orcharding at the stupendous price of $51,000, must be presented. These show that this invalided soldier, though evidently imposed upon, stood manfully by his poor bargain until the defendants over-reached themselves by seizing the ranch during his temporary absence!

The year before Bromley bought the ranch from the Warrens, Mr. Warren testified that the crop return was $19,700 gross (Tr. pp. 152 and 195), and on this figure he sold. In 1917 the same property yielded $6000 gross and for the year 1921 Warren said he expected "a gross yield in the neighborhood of $7500."

> (By the Court.) Q. So that 1919 was a very exceptional crop?
> (Mr. Warren.) A. It was an exceptional year. (Tr. p. 183.)

Mr. Pash, a witness called by the defense, testified on cross-examination:

> The returns from my orchard for 1920 compared with the returns for 1919 showed a wonderful loss in 1920 over 1919. (Tr. p. 213.)

Bromley paid his $6000 down when he bought (admitted by the pleadings and in the testimony), and with the prospect of a $19,700 crop borrowed money from the Bank of San Jose and the Garden City Bank, and purchased a bean sprayer, a tractor, a cultivator and many other things. On some of these he made partial payments only and he was optimistic in his ignorance. Strange indeed it is, that the persons who complain of Mr. Bromley's debts are,

not his creditors, but the Warrens to whom he paid $6000 in cash and to whom he owes nothing!

Harry Postlethwaite with over thirty-three years (Tr. pp. 142-3) of fruit ranching and appraising of orchard property behind him, testified to seeing the 51-acre property about a week after Bromley bought it and he said:

> Q. What was the general condition of the property at that time in your view, as an experienced orchardist?
>
> A. The orchard and trees were simply in a rotten condition; the place looked as though it had not been cared for, for years.
>
> WITNESS (continuing). I might say the trees were falling to pieces with rot, a great many of the old trees, the trunks were absolutely rotten; once or twice I put my hand right through the trunk, and told Mr. Bromley to shake hands with me: and the young trees that were interset among the old trees, I made the remark they were practically dead, giving the reason that they had not been covered to protect them from insects; the borers got in, and they looked as though they were practically dead; they were so stunted. They were mostly apricots. I saw the walnut trees. I think that most of them were either dead or dying. They were young trees not bearing. (Tr. p. 143.)

> The orchard looked to me as though it was simply ridden with gophers and squirrels. The trees must have been "girdled" the season before; there were a number of trees that had been girdled and I showed them to him. On January 7, 1920, I showed him a number of trees that had been girdled, where the gophers had gone around the trunk of the tree, and partially or thoroughly taken the bark off. In

most cases it does kill the tree. I have no idea how many trees had been injured in that way.

* * * A. I think it was the worst place I ever saw for gophers. (Tr. pp. 148-9.)

A. The trees had been very, very poorly pruned for a number of years. * * * I told Mr. Bromley whoever was pruning the trees was doing a very poor job. (Tr. p. 151.)

Q. Did Mr. Bromley state to you on January 7th, that he was dissatisfied with his purchase?

A. No, he was very optimistic. * * * While the fruit was on the trees he was optimistic; he could see tons where I could only see pounds. (Tr. p. 151.)

* * * I know as a matter of fact, that Mr. Bromley was not an orchardist and never farmed in his life before. I understand he was told that he could get enough money out of the crop to practically pay a very large portion of the purchase price. (Tr. p. 154.)

Mr. SCHLESINGER. Q. You did find a large number of dead trees on that ranch on January 7th?

A. Trees that were apparently dead.

WITNESS (continuing). I am not able to estimate the number. Right where there were young trees planted there were some old trees too; a great many apparently dead, and a great many dying. (Tr. pp. 156-7.)

These excerpts from the record are reproduced to show the optimism, enthusiastic work of Mr. Bromley in trying to live up to his contract and at the same time his inexperience in orcharding and the worthlessness of the property he had purchased.

Bromley the novice, "could see tons" of fruit where Postlethwaite, the experienced orchardist, "could only see pounds". As to prices in 1919 "the exceptional year" and 1920, Mr. Bromley's year, Mr. Postlethwaite testified:

> Yes, I know the prices very well that were paid for prunes, apricots and peaches in the years 1919 and 1920. The prices in 1919 were considerably higher on prunes, and somewhat higher on apricots and things like that than in 1920. In 1920 the selling price opened at a pretty good high price, but all the canneries lost money, that put down that price, and the co-operative canneries later could not make those high returns. (Tr. p. 155.)
>
> * * * * * *
>
> Q. Did you know it in the year preceding the year of Mr. Bromley's agreement to purchase, that that ranch produced nearly $19,000 in crops?
>
> A. I heard that. I was very much astonished except for one reason.
>
> The COURT. Q. What was the one reason?
>
> A. The year before that, 1919, in September or early in August, there was 6¼ inches of rain fell in two days; I have a friend who has an orchard very close to the Warren orchard, and I believe if it had not been for that rain that orchard would have died; but they got one of the best crops they ever got, it was caused by that rain. If the Warrens did get that much I think it was caused by the same reason. If sick trees get a little high life they bud and do a little spurt that they are not accustomed to. (Tr. pp. 149-50.)

These extracts from the record show the false light in which the plaintiff is put by the brief of counsel. I have shown that Mr. Bromley, as an invalid, inex-

perienced in orcharding, entered into this contract, labored optimistically and ran into debt. It was only in the fall of the year when poor crops and low prices came that he realized that he had a "white elephant" on his hands and yet he testified:

> * * * I intended to take care of it to the best of my ability and carry out my contract to the letter, but I must combine it with my other business pursuits. (Tr. p. 112.)

Neither in his pleadings nor in any of his testimony did Mr. Bromley ever suggest that he had been victimized by the purchase of a worthless property. It has remained for the defense to make charges of misrepresentation—charges that are as untrue as they are irrelevant.

Nothing whatever of law or fact has been advanced by counsel as grounds for reversing or modifying in any manner whatever, the judgment of the Honorable Judge of the U. S. District Court.

Dated, San Francisco,
March 3, 1923.

Respectfully submitted,

ARTHUR H. BARENDT,
Attorney for Defendant in Error.